The Federal Communications Commission is charged by Congress with regulating broadcasting in the public interest. One of the factors included in regulatory decisions is the ability of business entities to make a profit broadcasting. The public interest, however, does not stand for the proposition that the more profitable each media company becomes, the better it serves the public interest. Profitability is only profitable to the public when it increases service to the public.

The FCC recognizes this limit by also focusing on the existence of competition. Competition is the force which pushes business-entities to take cognizance of the needs of their customers. Competition allegedly bends capitalists irresistibly towards the needs of the public, not intelligence or good will.

Experts can disagree about the meaning of studies and the reliability of so-called predictive models. Some facts, however, are not open to dispute. One fact should be at the center of this regulatory decision.

Before the 2004 presidential election, investigative reporters working for the New York Times discovered the existence of a secret, domestic wire tapping project of massive scale being conducted by the National Security Agency at the behest of the sitting President.

One can disagree about whether this program was constitutional, was within the President’s power, or was pragmatically worth its cost.

One cannot disagree that the existence of this program was not disclosed to the voters of the United States in time for them to consider it when deciding how to cast their votes for president in November 2004. One cannot disagree that the presidential election was close. One cannot disagree that the sitting President, who intervened on behalf of secrecy, retained his office.

Why did the New York Times sit on this story? We do not know. We do know that the New York Times printed the story only after its own reporters were about to publish a book containing the story. Even then, the length of time the story was suppressed was not known to the public until New York Magazine published its own story about the New York Times. Consider two sets of basic propositions.

First: The public interest centers on knowing. The public interest centers on knowing facts relevant to voting. The public interest centers on knowing facts relevant to voting for the most powerful government officials. Conclusion: The public interest was disserved by the suppression of this story.

Second: Businesses pay attention to what affects their profits. Being on good terms (or at least not bad terms) with powerful government officials can affect businesses profits. The more types of businesses a corporation engages in, the more ways an annoyed government official may find to swat the gadfly-business.   A rational business (especially a conglomerate), therefore, will not act against the known wishes of the President of the United States unless it believes in the existence of a stronger, countervailing pressure. The only possible countervailing pressure would be loss of income from dissatisfied customers going to a competitor. The public cannot discipline a business through competition unless another business exists which is willing to make the public's desired choice available in the market. The only "effective" competition would be another news source with the resources to find and publish the story before the New York Times would be able to do so. Conclusion: The New York Times was willing to sit on the story because it did not believe in the existence of effective competition.   This analysis is reinforced by the timing of the belated release. As soon as a credible threat of competition existed (i.e. as soon as the reporters were about to publish independently) the New York Times released the story.

This should not be dismissed as merely one isolated incident, or one act of patriotism (or cowardice) by one publisher. The important point is not that the New York Times backed down. The important point is that no source published this story before the election.

Competition is effective when it has the desired effect, when the public gets the needed service, the story before the election. The public did not get the story. Competition is, therefore, ineffective by the only definition that counts -- failure to serve the public.

Deregulation has not worked. Deregulation has not triggered the existence of a hoard of investigative reporters so hot on the trail of the buried, substantive story that someone will be sure to bring it to the public. Seemingly, few investigate and even fewer publish. This hole in public service cannot be filled by any number of air time minutes spent on local gardening shows.

Anyone may be able to publish a blog on the internet. Getting attention for your blog is more difficult. Investigative reporting takes much more. Certainly, the New York Times' actions show that it did not fear being scooped by a blog. The Internet is simply not a market substitute for the type of investigative reporting at the center of the public interest.

This one outrageous incident is sufficient factual showing to rebut any alleged constitutional infirmity with media-ownership limits. The public has the most compelling interest in taking steps to change a regulatory landscape where not one news source reported a story with obvious potential to change the results in a presidential election.

This one outrageous incident should be more than sufficient reason for the FCC to raise the level of competition in hard news by increasing ownership limits across the board or otherwise tying its regulations to the provision of hard news. The FCC should not consider leaving public service to the economic market until the economic market has demonstrated that it is working for the public interest, i.e. when, and only when, news sources routinely scoop each other on substantive stories about important issues.

Respectfully submitted,

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